

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of)
JUNIOR COLLEGE DISTRICT OF)
METROPOLITAN KANSAS CITY, MISSOURI) File No. 0001784407
For Renewal of License for Educational)
Broadband Service Station WLX575, Kansas City,)
Missouri)
TWIGGS COUNTY MIDDLE SCHOOL) File No. 20020920AAB
For Renewal of License for Educational)
Broadband Service Station WLX666,)
Jeffersonville, Georgia)
LAMESA INDEPENDENT SCHOOL DISTRICT) File No. 0001801289
For Renewal of License for Educational)
Broadband Service Station WNC316, Lamesa,)
Texas)

ORDER ON RECONSIDERATION

Adopted: November 27, 2006

Released: November 28, 2006

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On May 6, 2005, the Junior College District of Metropolitan Kansas City, Missouri (Metropolitan) filed a Petition for Reconsideration of the decision by the Broadband Division, Wireless Telecommunications Bureau to dismiss Metropolitan's application to renew Station WLX575 for failure to timely respond to a Notice of Return.1 We also have before us two other Petitions for Reconsideration of dismissed renewal applications for failure to timely respond to a Notice of Return.2 For the reasons discussed below, we grant the Metropolitan Petition, the Twiggs Petition, and the Lamesa Petition, reinstate the associated renewal applications, and direct processing of those applications.

1 Junior College District of Metropolitan Kansas City, Missouri, Petition for Reconsideration (filed May 6, 2005) (Metropolitan Petition).

2 Twiggs County Middle School, Petition for Reconsideration (filed Apr. 8, 2005) (Twiggs Petition); Lamesa Independent School District Petition (filed Apr. 14, 2005) (Lamesa Petition).

II. BACKGROUND

2. EBS Station WLX575, operating on the G-group channels in Kansas City, was originally licensed to Northern Arizona University Foundation (NAUF).³ On September 12, 1995, NAUF filed a certification of completion of construction of Station WLX575.⁴ On December 12, 1995, NAUF filed a Notice of Consummation of assignment, which assigned Station WLX575 to Metropolitan.⁵

3. On September 14, 1995, Metropolitan filed a modification application to move its facilities to be co-located with EBS Station WHR531, the A-group channel station.⁶ That application was granted on March 20, 1998.⁷ The modifications for the co-located facilities were completed in May 1998.⁸ Public Television 19, Inc., the licensee of Station WHR531, filed a certification of construction for Station WHR531 in May 1998.⁹ The Bureau's files do not contain a certification of construction of the modifications for Station WLX575, however, and Metropolitan cannot verify whether it certified construction of the modifications.¹⁰ Stations WHR531 and WLX575 use the same tower location.¹¹

4. On June 24, 2004, Metropolitan filed an application to renew its authorization for Station WLX575.¹² On January 14, 2005, the Bureau issued a Notice of Return for Metropolitan's renewal application indicating that the Commission's records did not contain a certification of completion for Station WLX575.¹³ The Notice of Return further indicated that Metropolitan must amend its application to include a certification of completion in order for the Bureau to continue processing its renewal request.¹⁴ The Notice of Return also stated that electronic renewal applications needed to be accompanied by an attachment containing the completed manual form and information required by the manual form.¹⁵ The Notice of Return further indicated that "[i]f you do not file an amendment to your application within 60 days of the date on the top of this letter, your application will be dismissed."¹⁶

³ File No. BPIF-19831107DA (granted May 29, 1992).

⁴ Petition at 2.

⁵ File No. BAPIF-19950112DR.

⁶ File No. BMPIF-19950914LX.

⁷ Metropolitan Petition at 3.

⁸ *Id.*

⁹ *Id.* See also Metropolitan Petition at Attachment D.

¹⁰ Metropolitan Petition at 3. The Bureau's records do contain the certification of construction filed by NAUF on September 12, 1995. *Id.*

¹¹ Metropolitan Petition at Attachment D, Letter from Donald Doucette, Vice Chancellor, Junior College District of Metropolitan Kansas City, Missouri to the Federal Communications Commission (dated Apr. 29, 2005).

¹² File No. 0001784407. In Eastern New Mexico University, *Memorandum Opinion and Order*, 19 FCC Rcd 19540 (WTB 2004) (*Eastern New Mexico*) at Attachment, Metropolitan was granted a waiver of Section 74.15(e) of the Commission's rules to permit processing of its late-filed renewal application.

¹³ Letter from Federal Communications Commission to Leo J. Hirner, JR College District of Metro KS City MO, Ref. No. 3255557 (Jan. 14, 2005) (Return Letter).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

5. Metropolitan did not respond to the Notice of Return within 60 days.¹⁷ On April 2, 2005, Metropolitan's application to renew its authorization for Station WLX575 was dismissed.¹⁸ On April 6, 2005, the Bureau released a Public Notice that indicated that the renewal application for Station WLX575 was dismissed.¹⁹ On May 6, 2005, Metropolitan certified that it had completed construction of the modifications in May 1998.²⁰

6. As previously indicated, we also have before us two other cases in which EBS licensees failed to respond to the Notice of Return within 60 days.²¹ Twiggs County Middle School (Twiggs) was the licensee of EBS Station WLX666, Jeffersonville, Georgia. On September 20, 2002, Twiggs filed an application to renew its authorization for Station WLX666.²² On December 13, 2004, the Bureau issued a Notice of Return for Twiggs' renewal application indicating that:

A review of Commission records indicates no record of a Construction Certification for station WLX666 and deadline date for notification at 7/31/1996. Unless an Extension or Certification was filed, this would not be a valid station and cannot be renewed. Please check your records to verify the status of this station. If you have filed a Certification of Construction, please amend your application to provide documentation, so we may continue processing your request. Without such certification, we cannot renew your license.²³

Twiggs did not respond to the Notice of Return within 60 days.²⁴ On March 5, 2005, Twiggs' application to renew its authorization for Station WLX666 was dismissed.²⁵ On April 6, 2005, the Bureau released a Public Notice that indicated that the renewal application for Station WLX666 was dismissed.²⁶

7. Lamesa Independent School District (Lamesa) was the licensee of EBS Station WNC316, Lamesa, Texas. On July 2, 2004, Lamesa filed an application to renew its authorization for

¹⁷ Metropolitan Petition at 4.

¹⁸ A letter memorializing that dismissal was sent on April 4, 2005. Letter from Federal Communications Commission to Leo J. Hirner, JR College District of Metro KS City MO, Ref. No. 3255557 (Apr. 4, 2005) (Dismissal Letter).

¹⁹ Wireless Telecommunications Bureau Site-by-Site Action, *Public Notice*, Report No. 2114 (dated Apr. 6, 2005). *See also* Metropolitan Petition at 2.

²⁰ File No. 0002154917. *See also*. Metropolitan Petition at Attachment H, Letter from Barry S. Persh, Dow, Lohnes & Albertson to Marlene H. Dortch (dated May 3, 2005). *See also* Metropolitan Petition at Attachment H, Letter from Donald Doucette, Vice Chancellor, Junior College District of Metropolitan Kansas City, Missouri (dated Apr. 29, 2005).

²¹ Twiggs Petition, Lamesa Petition.

²² File No. 20020920AAB. In *Eastern New Mexico, supra*, Twiggs was granted a waiver of Section 74.15(e) of the Commission's rules to permit processing of its late-filed renewal application.

²³ Letter from Federal Communications Commission to Twiggs County Middle School, Ref. No. 3197096 (Dec. 13, 2004).

²⁴ Twiggs Petition at 2.

²⁵ A letter memorializing that dismissal was sent on March 7, 2005. Letter from Federal Communications Commission to Twiggs County Middle School, Ref. No. 3354543 (Mar. 7, 2005).

²⁶ Wireless Telecommunications Bureau Site-by-Site Action, *Public Notice*, Report No. 2089 (dated Mar. 9, 2005).

Station WNC316.²⁷ On January 14, 2005, the Bureau issued a Notice of Return for Lamesa's renewal application indicating that the following additional information was required:

Please complete Item 3b and Item 11 on FCC Form 330-R. Please amend your application to include certification that station WNC316 is operational, and an explanation of the educational programming being provided. Please refer to 47 C.F.R. Section 74.931 concerning purpose and permissible service.²⁸

Lamesa did not respond to the Notice of Return within 60 days.²⁹ On April 4, 2005, Lamesa's application to renew its authorization for Station WNC316 was dismissed.³⁰ On April 6, 2005, the Bureau released a Public Notice that indicated that the renewal application for Station WNC316 was dismissed.³¹

8. Metropolitan argues that the public interest would be served by reinstating its applications because Metropolitan uses that station to provide educational programming to four fire department sites and five community college district sites, precisely the educational uses the Commission envisioned for EBS stations.³² Moreover, Metropolitan argues, Station WLX575 was constructed and operated in accordance with Commission rules.³³ Although Metropolitan admits that it failed to respond to the Bureau within 60 days of the date on the Notice of Return, it maintains that cancellation of its license would be "an overly draconian measure and an unreasonable and inappropriate sanction to rescind the station license on that basis alone."³⁴ Metropolitan further admits that it did not have the personnel and procedures in place to properly and timely respond to Commission correspondence.³⁵ Also, Metropolitan was not represented by communications counsel.³⁶ Metropolitan indicates that it has now furnished the copies of the requested certification of completion and re-submits its renewal application with that information.³⁷ Metropolitan and the other licensees assert that they have instituted new procedures to ensure that they will not again fail to respond to Commission correspondence.³⁸ With respect to the other applicants, Twiggs provides a copy of a construction certification demonstrating that

²⁷ File No. 0001801289. In *Eastern New Mexico, supra*, Lamesa was granted a waiver of Section 74.15(e) of the Commission's rules to permit processing of its late-filed renewal application.

²⁸ Letter from Federal Communications Commission to Ken McCraw, Superintendent, Lamesa Independent School District, Ref. No. 3255558 (Jan. 14, 2005).

²⁹ Lamesa Petition.

³⁰ A letter memorializing that dismissal was sent on April 4, 2005. Letter from Federal Communications Commission to Ken McCraw, Superintendent, Lamesa Independent School District, Ref. No. 3425038 (Apr. 4, 2005).

³¹ Wireless Telecommunications Bureau Site-by-Site Action, *Public Notice*, Report No. 2114 (dated Apr. 6, 2005).

³² Metropolitan Petition at 3.

³³ *Id.* at 4. *See also* Twiggs Petition.

³⁴ *Id.* Twiggs County and Lamesa make similar arguments. *See* Twiggs County Petition, Lamesa Petition.

³⁵ *Id.* at 5. Moreover, Metropolitan states that unlike other EBS licensees, it does not lease its excess capacity and therefore did not have a commercial lessee to assist it in understanding Commission rules and practices. Metropolitan Petition at Attachment E, Declaration of Donald Doucette, Vice Chancellor for Education and Technology of the Junior College District of Kansas City, Missouri.

³⁶ Metropolitan Petition at 5.

³⁷ *Id.* at 4.

³⁸ *See, e.g.*, Metropolitan PFR at 5.

its station was timely constructed.³⁹ Twiggs also reports that Station WLX666 is part of a system that provides educational programming to its receive sites and that Twiggs has recently agreed to lease capacity to Clearwire Corporation to provide wireless broadband services to its students and to the greater community.⁴⁰ Lamesa's lease with Nucentrix Broadband Networks, Inc. (Nucentrix) has been assigned to Digital Broadcasting Corporation, Inc., which has agreed to assume Nucentrix's former obligations under that lease.⁴¹

9. We disagree with Metropolitan and the other petitioners that the dismissal of their applications for failure to respond to the return letters was inappropriate. Under Section 1.934(c) of the Commission's Rules, an application may be dismissed for failure to prosecute "for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information."⁴² The Bureau's practice is to send a Notice of Return to applicants when additional information is necessary for the Bureau to process the application. The Notice of Return plainly states that "[i]f you do not file an amendment to your application within 60 days of the date on the top of this letter, your application will be dismissed." Each of the applicants was placed on notice that their applications would be dismissed if they failed to respond to the return letters. They failed to respond, and they do not offer any legitimate explanation for their failure to respond. Accordingly, we conclude that the dismissal of each of these applications was proper.

10. The pertinent question before us is whether to reinstate the applications and licenses on reconsideration. There is precedent for refusing to reinstate renewal applications when an applicant fails to offer a justification for failing to respond to a return letter.⁴³ In this case, however, based upon the totality of the circumstances involved, we believe the public interest would best be served by granting the petitions and reinstating the renewal applications. As we have noted previously, when the predecessor service to EBS was administered by the former Mass Media Bureau, licensees were often treated very leniently, even in the face of clear failures to comply with the Commission's procedural rules.⁴⁴ Furthermore, the public was aware of this lenient treatment of EBS licensees.⁴⁵ Under these circumstances, notwithstanding the Commission's Rules and the language in the return notices, licensees may not have been fully aware of the consequences of the failure to respond to the return notice. In addition, we note that in the case of Metropolitan and Twiggs, cancellation of the licenses would result in the loss of educational programming to the sites served by the stations, a result that would be unfortunate. Furthermore, both Twiggs and Lamesa have leased their excess capacity to commercial providers who could use the spectrum to provide advanced services to students and others. If these licenses are cancelled, no educational licensee will be able to provide the educational programming or other services in the near future. This situation has occurred not only because the Commission has not permitted any new EBS applications since 1995, but also because the Commission will not decide how vacant EBS spectrum will be assigned in the future until after the completion of the transition of the 2500-2690 MHz band.⁴⁶ The transition of the 2495-2690 MHz band could take several years to accomplish.⁴⁷ In the

³⁹ Letter from Jenny L. Hurd, General Counsel, Wireless One to William F. Caton, Acting Secretary, Federal Communications Commission (Mar. 14, 1996) (Twiggs Petition, Exhibit 2).

⁴⁰ Petition at 6, Twiggs Renewal Application, Exhibit 1.

⁴¹ Lamesa Renewal Application.

⁴² 47 C.F.R. § 1.934(c).

⁴³ See RAM Technologies, Inc., *Order on Reconsideration*, 16 FCC Rcd 10919 (WTB PS&PWD 2001).

⁴⁴ See Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004).

⁴⁵ *Id.* at 19544 ¶ 10.

⁴⁶ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

meantime, no entity may apply for a new EBS license. Accordingly, we will grant the petitions and reinstate the applications.⁴⁸

11. Notwithstanding our action today, we strongly remind EBS licensees to exercise due diligence in complying with all our rules and to emphasize the importance of timely responses to Commission requests for information. While we have decided to reinstate these particular applications, we expect that in the future, EBS licensees shall meet the same standards for renewal and compliance with the Commission's Rules as other wireless licensees. We explicitly reserve the right to refuse to reinstate applications when an applicant fails to respond to a return letter.

12. With respect to Metropolitan, we will process the certification of completion of construction it filed along with its renewal application. Twiggs has provided the information requested in its return letter. We direct Lamesa to amend its application within sixty days of the release of this order to provide the following information: (a) a response to Questions 54 and 55 on FCC Form 601; and (b) a statement of the dates when Station WNC316 was off the air, if any.⁴⁹ If Lamesa fails to provide this information within sixty days of the release of this order, the Broadband Division shall dismiss Lamesa's application for failure to prosecute.

III. CONCLUSION AND ORDERING CLAUSES

13. The decision to dismiss the applications at issue was correct. However, based upon the information provided in the petitions, we have decided to reinstate the renewal applications. Accordingly, we grant the three petitions at issue.

14. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.106 the Petitions for Reconsideration filed by Junior College District of Metropolitan Kansas City, Missouri on May 6, 2005, by Twiggs County Middle School on April 8, 2005, and by Lamesa Independent School District on April 14, 2005 ARE GRANTED.

(...continued from previous page)

Third Memorandum Opinion and Order and Second Report and Order, WT Docket No. 03-66, FCC 06-46, ¶ 313 (2006)

⁴⁷ See *id.* at ¶¶ 106-107 and 150. The transition of the 2500-2690 MHz band will occur in five phases that may take 51 months to complete, depending on the market. Some markets may transition much quicker. The transitions in other markets, however, may take longer if they are stayed pending resolution of a dispute, if one or more affected licensees seeks dispute resolution through a third party.

⁴⁸ In addition to its application to renew Station WLX575, File No. 0001784407, filed on June 24, 2004, Metropolitan filed a certification of completion of construction on May 6, 2005, File No. 0002154917, and another application to renew Station WLX575 on May 6, 2005, File No. 0002151610. On our own motion, we waive Section 1.946(d) of the Commission's Rules to allow consideration of Metropolitan's untimely certification of completion of construction. We will process the certification of completion of construction. In light of our reinstatement of the first renewal application, we will dismiss the second renewal application as moot.

⁴⁹ If Station WNC316 was off the air for a period of twelve months or more prior to January 10, 2005, Lamesa will need to file for and receive a waiver of the former discontinuance of service rule, 47 C.F.R. § 74.932(d). See Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of BRS and EBS Discontinuance of Service Rules, *Public Notice*, 20 FCC Rcd 5275 (WTB BD 2005); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 20 FCC Rcd 54 (WTB BD 2005); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 19 FCC Rcd 18752 (WTB BD 2004).

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 1.934 of the Commission's Rules, 47 C.F.R. § 1.934, that the application for renewal of license of Station WLX575 filed by Junior College District of Metropolitan Kansas City, Missouri on May 6, 2005 (File No. 0002151610) IS DISMISSED AS MOOT.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that the Broadband Division SHALL REINSTATE AND PROCESS the applications filed by Junior College District of Metropolitan Kansas City, Missouri (File No. 0001784407), Twiggs County Middle School (File No. 20020920AAB) and Lamesa Independent School District (File No. 0001801289) in accordance with this *Order on Reconsideration* and the Commission's rules and policies.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 1.946(d) of the Commission's Rules, 47 C.F.R. § 1.946(d), that the Broadband Division SHALL PROCESS the certification of completion of construction filed by Junior College District of Metropolitan Kansas City, Missouri on May 6, 2005 (File No. 0002154917) in accordance with this *Order on Reconsideration* and the Commission's rules and policies.

18. These actions are taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Cathleen A. Massey
Deputy Chief, Wireless Telecommunications Bureau